STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. 2000B065

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

LENTDELL NEWKIRK,

Complainant,

vs.

DEPARTMENT OF CORRECTIONS,

Respondent.

This matter was heard on November 26-27, 2001, by Administrative Law Judge Robert W. Thompson, Jr. Respondent was represented by Joseph Haughain, Assistant Attorney General. Complainant appeared in-person and was represented by Craig Cornish, Attorney at Law.

MATTER APPEALED

Complainant appeals the disciplinary termination of his employment. For the reasons set forth below, a suspension is substituted for the termination.

ISSUES

1. Whether respondent's action was arbitrary, capricious or contrary to rule or law;

2. Whether complainant committed the acts for which discipline was imposed.

STIPULATED HISTORICAL FACTS

1. "This Stipulation is not intended to cast an adverse light on either party, but merely to accommodate Mr. Newkirk's desire to provide some background facts which explain in part some mutual frustrations and disagreements that existed between the parties prior to September, 1999 and Mr. Newkirk's state of mind during the relevant events of September 9 - November 19, 1999. The parties agree that this rendition of facts is for the purpose of shortening the time required for hearing, but that no facts prior to September 9, 1999 were considered by DOC in imposing discipline, nor is Mr. Newkirk alleging that any of the facts set forth herein contribute to his assertion that his termination was arbitrary and capricious.

2. "On August 30, 1999, Mr. Newkirk claimed to have visual difficulties in filling out the weekly inventory forms.

3. "On that date Mr. Newkirk claimed, because of these visual difficulties, to have enlisted inmate assistance to write the inventory count on the inventory forms.

4. "On or about March 20, 1998 Mr. Newkirk was told of inaccuracies in the inventories by his supervisor, Lieutenant Amy M. Downs (now Koklich), and told not to let inmates perform the inventory. He was also told to complete the inventories on Sundays, not Thursdays or Fridays. In October, 1998 Ms. Koklich again verbally counseled Mr. Newkirk regarding his allowing the kitchen inmate staff to complete the storeroom inventory forms. In February, 1999 Ms. Koklich counseled Mr. Newkirk again for allowing inmate kitchen staff to complete the inventories. A Colorado Department of Corrections Performance Plan & Evaluation, dated April 7, 1999 instructed Mr. Newkirk to improve in

regards to completing inventories himself and not let inmates do them. Pursuant to a Confirming Memorandum, dated April 7, 1999, Mr. Newkirk agreed to conduct inventories personally and on Mondays. Mr. Newkirk's supervisor Lieutenant Amy Koklich believed that by using inmates to fill out the inventory forms that Mr. Newkirk was failing to fulfill his responsibilities to personally complete his assigned inventory tasks.

5. "In July, 1999 Ms. Koklich became aware that Mr. Newkirk was still allowing inmates to complete the food storeroom inventories.

6. "On August 30, 1999 Mr. Newkirk admitted that he had made mistakes in the inventories, and asked for an opportunity to obtain glasses to see if this helped his performance.

7. "In July, 1999 Mr. Newkirk met with Ms. Koklich and Wayne Maiden, Physical Plant Manager, concerning the possibility of moving Newkirk to a different kitchen assignment, specifically one where he would only be responsible for supervising the preparation of meals.

8. "In August 1999 the schedule for September assignments was posted which scheduled Mr. Newkirk to work on the kitchen staff shift from 4:00 a.m. to 12:00 p.m., with Sundays and Mondays off. Previously Mr. Newkirk's shift in the storeroom was 4:00 a.m. to 12:00 p.m., with Fridays and Saturdays off.

9. "Prior to the posting of the September 1999 schedule Ms. Koklich had informally polled the staff about their preferences for duties and schedules.

10. “Due to the fact that Mr. Newkirk was on vacation and that he was not talking to Ms. Koklich, he was not consulted about his preferences for the September 1999 duties and schedules.

11. “When the September 1999 schedule was posted, Mr. Newkirk discovered that Amy Benton had been assigned to the storeroom. Ms. Benton did not ask for nor desire these additional duties.

12. “After seeing the September 1999 schedule, Mr. Newkirk complained to Warden Abbott that, for a variety of reasons, he was being treated unfairly.

13. “On August 30, 1999, Warden Abbott held an informal staff meeting with Ms. Koklich, Manager Wayne Maiden and Mr. Newkirk to discuss Mr. Newkirk’s complaints.

14. “Mr. Newkirk was the only African-American on the kitchen staff.

15. “At the informal meeting Mr. Newkirk complained of the following:

a. That he did not want to be removed from storeroom duty, but rather wanted to be given an opportunity to obtain glasses to see whether the glasses eliminated his problems. He also expressed a desire to revert to his former schedule of 8:00 a.m. to 4:00 p.m. with Fridays and Saturdays off.
b. That he believed that he was unfairly treated by not being consulted about the September 1999 schedule while his co-workers were consulted by Ms. Koklich concerning their preferences for the September 1999 schedule.
c. Mr. Newkirk was concerned that Sergeant Nilson, in connection with a separate incident approximately eight months prior, was

allowed to change from Thursdays and Fridays off to Fridays and Saturdays off. Mr. Newkirk believed Sergeant Nilson had received preferential treatment, which DOC denies.

16. "Mr. Newkirk believed that his perception of differential treatment was due to his race – African-American. His perception of racially discriminatory treatment from Ms. Koklich was due to her having made two statements: (1) that black women often have louder voices than non-black women; and (2) that Ms. Koklich referred to a black inmate's recent birth as having given birth to a litter of puppies.

17. "Ms. Koklich has since explained the first reference to a lesson she learned in a DOC training session. This training alerted DOC staff that black females may sometimes talk louder than other ethnic groups, and that this may not be a sign of aggression but rather a cultural trait. The purpose of this training is to cultivate tolerance and understanding.

18. "Ms. Koklich has also explained the second statement as a jocular and light-hearted statement that a black female inmate who had a baby 'had puppies.' This was not a racially derogatory comparison between blacks and puppies. It was a racially neutral comparison between babies and puppies.

19. "After the informal meeting the decision was made to not return Mr. Newkirk to the storeroom."

STIPULATIONS OF FACT

The parties stipulate that the following facts are true and accurate.

20. “Lentdell Newkirk was employed by DOC from July, 1993 – November 19, 1999. He was certified and employed as a Food Services Support Supervisor I at CWCF as of November 19, 1999, when he was terminated.

21. “The appointing authority for CWCF is Warden James A. Abbott.

22. “Amy Koklich, the Food Services II for CWCF, was Newkirk’s immediate supervisor.

23. “Newkirk did not see any of the three mental health evaluators on the list provided him by Abbott at the R-6-10 meeting held on October 8, 1999.”

FINDINGS OF FACT

The Administrative Law Judge considered the exhibits and the testimony, assessed the credibility of the witnesses and made the following findings of fact, which were established by a preponderance of the evidence.

24. On August 30, 1999, following an informal meeting with Warden Abbott and others at CWCF (Colorado Women’s Correctional Facility), complainant left to pick up his new eyeglasses in hopes of then being able to read the inventory numbers. Upset, he had been experiencing stress, anxiety, and depression, which he attributed to his job. He was also still suffering from the effects of a friend in Colorado Springs having been killed in July. En route to pick up his glasses, under unclear circumstances, he ended up in the emergency room of a hospital, where he was administered an EKG and had his blood pressure checked. He was advised to see a psychologist.

25. Complainant was scheduled to be on annual leave for two weeks beginning August 31. On September 9, he saw Carol Schreuder, a Licensed Clinical Psychologist. Dr. Schreuder gave complainant a note saying that he needed to be on medical leave from September 9 through September 19 due to high blood pressure, depression, and severe anxiety, all of which were work-related. Schreuder also noted that complainant needed administrative changes that would bring about stress relief.

26. On September 13, complainant's supervisor, Amy Koklich, telephoned him to inquire as to his absence. He faxed her the note from Schreuder. He had previously talked to someone at the facility concerning his time off.

27. On September 14, 1999, having seen the note from Schreuder, Employee Benefits Coordinator Verna Williams telephoned complainant regarding the possibility of a worker's compensation injury. Complainant was agitated and it was difficult to follow exactly what he was saying. At one point he said words to the effect of, "What do I have to do, start shooting people?" He was referring to how people in the workplace ignore an employee's stress. Williams was alarmed. She interpreted his statement as a threat that he was going to shoot somebody. She told complainant that he needed to fill out a worker's compensation incident report, and that he had to see Dr. Shoemaker, the agency's worker's compensation physician.

28. On September 16, Williams met complainant in the lobby of DOC central headquarters in Colorado Springs and gave him the necessary worker's compensation paperwork to fill out, which he did.

29. On September 20, 1999, complainant met with Dr. Shoemaker in Colorado Springs for thirty to forty minutes. Shoemaker concluded that complainant's condition was not a work-related injury, but that he should take time off work, anyway, because he was depressed and had had thoughts of hurting people—he felt stress to that degree. He did not make a specific threat, and Shoemaker did not believe that he posed a danger. Complainant was mentally alert, rational, and cooperative. Shoemaker telephoned Williams to advise her of his determination that there was no work-related injury.

30. Williams testified that when Shoemaker called her on September 20, he stated that complainant had talked about going on a shooting rampage five times. This finding is not made, however, because Shoemaker denies making such a statement or that he said anything about complainant being a danger to himself or others. Persuasively, Shoemaker did not put any such comments in his written report, which he likely would have done if complainant had made such significant statements. Williams must have misunderstood something that she thought the doctor said. The doctor testified credibly and is a completely independent witness.

31. On September 21, 1999, Williams issued a memo to "Concerned Parties," without naming anyone in particular, stating that complainant had made the remark, "What do I have to do? Start shooting people?" Williams also wrote in the memo that Dr. Shoemaker had told her that complainant talked of shooting rampages at least five times. She then offered her own, though unqualified, personal opinion: "This signals an employee who feels victimized, and wants to become an avenger." No doctor diagnosed complainant in that way. Upon receipt of this memo, Warden James Abbott immediately issued a memo stating that

complainant should not be allowed access to the facility until undergoing a thorough pat search.

32. On September 24, Abbott placed complainant on administrative leave with pay because of, "information that you have made statements that are threatening in nature to some of our DOC staff."

33. Dr. Schreuder met with complainant six times between September 9, 1999, and November 19, 1999. Complainant complained about being too stressed to concentrate. He never expressed an intent to harm somebody. He suffered from a mental illness that was treatable by medication and therapy.

34. An R-6-10 meeting was held on October 8, 1999, attended by Abbott, complainant, and his attorney. Complainant's attorney announced that he would speak for complainant and denied all allegations. Abbott asked complainant to choose one of three DOC doctors, the names to be given to him, and to make an appointment to see one of those doctors for an evaluation. The purpose was to determine whether complainant should return to work or to determine what else should be done. This was a request, not an order which the appointing authority does not have the power to give. The names were given to the attorney, who advised complainant not to seek an appointment.

35. Further information not forthcoming, the appointing authority proceeded with his decision, taking under consideration the information that was available to him. He did not talk to Shoemaker or Schreuder. He read a November 1, 1999 letter from Schreuder to complainant's attorney, in which Schreuder suggested that, should complainant return to his current position under his existing emotional condition, "he may present a threat to himself or others at work." She recommended

that, “others … give him the respect to listen to the issues that are relevant to him for why the emotional distress first occurred.”

36. Without additional information from complainant, particulary a diagnosis from one of the DOC doctors, the appointing authority decided to terminate the employment of Lentdell Newkirk for violating DOC Regulation 100-29, the mandate on workplace violence.

37. Complainant had never been accused of making a threat before. His job performance was not a factor in the termination. The reasons for termination were the shooting statement and Dr. Shoemaker’s alleged statement that complainant spoke of shooting rampages five times.

38. Complainant’s employment was terminated on November 19, 1999. Since that time, he has held several jobs. He now works at Peterson Air Force Base as a lead cook/shift leader.

DISCUSSION

I. Arbitrary and Capricious

Board Rule R-6-9(B), 4 CCR 801, provides that, “If the board or hearing officer reverses a dismissal, but finds valid justification for the imposition of disciplinary action, a suspension may be substituted for a period of time up to the time of the decision.” This rule is in accord with the Board’s statutory authority to modify, as well as to reverse, an action of an appointing authority. *See* §24-50-103(6), C.R.S. The period of suspension may not exceed 135 days. *Rose v. Department of Institutions*, 826 P. 2d 379 (Colo. App. 1991). R-6-9(B) provides for the appropriate sanction in this case.

Substantial evidence supports the appointing authority's conclusion that complainant made a statement to the effect of, "What do I have to do, start shooting people?" However, the remark was made in the context of explaining the stress he felt and his perception that no one at work was taking his stress into account. He did not direct a threat toward anyone. He did not threaten to do anything. He had no history of violent behavior or remarks. The fact that the benefits coordinator was alarmed does not justify the termination of complainant's employment.

The allegation that Dr. Shoemaker stated that complainant talked of shooting rampages is not supported by the evidence. Precisely what complainant allegedly said was never stated. Complainant's job performance was not a factor in the decision; no events prior to September 9, 1999, were considered. Consequently, complainant, a six-year employee, was dismissed for posing what amounted to a rhetorical question.

Nevertheless, the appointing authority was rightfully concerned about ensuring that violence did not occur. He was not required to overlook even a generic statement that referenced shooting people. Yet, to impose the same sanction in this case as he might in the case of a direct, personalized threat is arbitrary, capricious or contrary to rule or law. More appropriate options were available to him.

It is respondent's burden to prove by a preponderance of the evidence that complainant committed the acts for which discipline was imposed. *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). This burden was not satisfied with respect to the allegation regarding remarks about shooting rampages. Be that as it may, respondent did not prove that there was just cause for the discipline of termination. *See Kinchen, supra*. The sanction of dismissal was so excessive under the found facts as to be arbitrary and capricious. A reasonable person, upon consideration of the entire record, would honestly and

fairly be compelled to reach a different conclusion. *See Wildwood Child & Adult Care Program, Inc. v. Colorado Department of Public Health & Environment*, 985 P.2d 654 (Colo. App. 1999). *See also Van DeVegt v. Board of County Commissioners of Larimer County*, 55 P.2d 703, 705 (Colo. 1936).

Under the circumstances of this case, complainant's dismissal should be rescinded and a disciplinary suspension of 135 days be substituted pursuant to R-6-9(B) and *Rose, supra*.

II. Attorney Fees

Section 24-50-125.5, C.R.S., provides that an award of attorney fees and costs is mandatory if it is found that the personnel action from which the proceeding arose "was instituted frivolously, in bad faith, maliciously or as a means of harassment or was otherwise groundless." This record does not support any of those findings. Therefore, this is not a proper case for a fee award.

CONCLUSIONS OF LAW

1. Respondent's action of terminating complainant's employment was arbitrary, capricious or contrary to rule or law.

2. Complainant committed one of the two acts for which discipline was imposed.

ORDER

Respondent's termination action is reversed. A disciplinary suspension of 135 days is substituted for the termination. Complainant shall be reinstated to his former position with back pay and benefits, except for the period of

suspension and any income complainant earned but would not have earned if respondent had not dismissed him.

DATED this ___ day of January, 2002, at Denver, Colorado.

_____
Robert W. Thompson, Jr.
Administrative Law Judge

NOTICE OF APPEAL RIGHTS

EACH PARTY HAS THE FOLLOWING RIGHTS

1. To abide by the decision of the Administrative Law Judge ("ALJ").

2. To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties. Section 24-4-105(15), C.R.S. Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. The notice of appeal must be received by the Board no later than the thirty (30) calendar day deadline. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), C.R.S.; Rule R-8-58, 4 Code of Colo. Reg. 801. If a written notice of appeal is not received by the Board within thirty calendar days of the mailing date of the decision of the ALJ, then the decision of the ALJ automatically becomes final. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990).

PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ may be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ. The filing of a petition for reconsideration does not extend the thirty calendar day deadline, described above, for filing a notice of appeal of the decision of the ALJ.

RECORD ON APPEAL

The party appealing the decision of the ALJ must pay the cost to prepare the record on appeal. The fee to prepare the record on appeal is $50.00 (exclusive of any transcription cost). Payment of the preparation fee may be made either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS.

Any party wishing to have a transcript made part of the record is responsible for having the transcript prepared. To be certified as part of the record, an original transcript must be prepared by a disinterested, recognized transcriber and filed with the Board within 45 days of the date of the designation of record. For additional information contact the State Personnel Board office at (303) 894-2136.

BRIEFS ON APPEAL

The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty calendar days after the date the Certificate of Record of Hearing Proceedings is mailed to the parties by the Board. The answer brief of the appellee must be filed with the Board and mailed to the appellant within 10 calendar days after the appellee receives the appellant's opening brief. An original and 7 copies of each brief must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double-spaced and on 8 1/2 inch by 11 inch paper only. Rule R-8-64, 4 CCR 801.

ORAL ARGUMENT ON APPEAL

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Rule R-8-66, 4 CCR 801. Requests for oral argument are seldom granted.

CERTIFICATE OF SERVICE

This is to certify that on the ____ day of January, 2002, I placed true copies of the foregoing INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE in the United States mail, postage prepaid, addressed as follows:

Craig M. Cornish
Attorney at Law
431 North Cascade Avenue, Suite 1
Colorado Springs, CO 80903

And by courier pick-up, to:

Joseph Haughain
Assistant Attorney General
Consumer Protection Section
1525 Sherman Street, 5th Floor
Denver, CO 80203

_____